

## It's about time: The legal context of policy changes for female offenders

Recently, issues relating to federally incarcerated women have surged to the forefront of corrections, resulting in legal challenges and new and exciting policy changes.

A comparison of the past and present will illustrate the issues being addressed and the gains made so far. This paper will focus primarily on changes in the areas of placement, programming, visits, and relationships with family and friends.

Above all, one will no doubt be struck by the length of time it has taken to achieve policy changes relating to female offenders. Placement of female offenders Perhaps the oldest and most widely debated issue relating to female offenders concerns their placement. In 1835, when no facility for female offenders existed, three women were placed in the infirmary of Kingston Penitentiary. By 1853, a separate ward for women was established. An additional 81 years then passed before the Prison for Women opened its doors in 1934.

But the establishment of the Prison for Women did not slow the debate over where federally incarcerated females should serve their sentences. Not four years after the Prison for Women opened, the Archambault Commission became the first of many commissions to suggest it be closed.

In fact, the 1914 Royal Commission on Penitentiaries had already suggested the federal government make agreements with the provinces to house female offenders so that they could be closer to their home communities.

Despite this early recognition of the need for female offenders to be placed close to their families and home communities, exchange of service agreements with the provinces were not begun until 1972. Although they were a significant step forward, the agreements were limited - not all federally incarcerated women were eligible for transfer to a provincial facility.

The issue of the effect of dislocation on female offenders came to a head between 1989 and 1991, when eight inmates in the Prison for Women committed or attempted suicide. On 15 July 1990, in the case of *The Queen v. Carol Maureen Daniels*, the Saskatchewan Court of Queen's Bench found that Ms. Daniels' section 7 Charter rights to life and security would be violated if she was incarcerated where she would be at a high risk of committing suicide.

In addition, her section 12 Charter right not to be subjected to cruel and unusual punishment would be violated if she was incarcerated in an institution far from her home, family and friends - it would amount to virtual exile.

Following the *Daniels* decision, the Correctional Service of Canada opened a wing in Saskatchewan Penitentiary (a men's institution) to house up to five female offenders. Although the *Daniels* decision was later set aside by the Court of Appeal on technical grounds, the women's wing at Saskatchewan Penitentiary is still open.

To date, no court has determined whether the existence of only one federal prison for women breaches the Charter rights of women in general.

However, this issue may well become irrelevant. In 1990, the Solicitor General of Canada announced that, based on the recommendations contained in the 1990 *Creating Choices: Report of the Task Force on Federally Sentenced Women*, five new facilities for women, including a healing lodge for aboriginal women, will be constructed in different regions of the country to replace the Prison for Women.<sup>(2)</sup> Programming Virtually every royal commission on corrections since 1934 has identified weaknesses in the variety and quality of programming for women.

Further, in 1981, the Canadian Human Rights Commission ruled that female offenders were being discriminated against because they had less access to training and rehabilitation programs than men.<sup>(3)</sup>

In response to the ruling, the Correctional Service of Canada broadened the scope of its educational and vocational programming for women. A 1988 handbook published by the Service points out the gains made:

"A wide variety of jobs, including institutional services, automated data processing, the inmate publication, and food services is available.... Programs at the institution provide a broad range of assistance to female inmates. They include: educational opportunities... vocational training, social development and individual program plans...."<sup>(4)</sup>

Despite the marked improvement in opportunities for federally incarcerated women, the *Daniels* decision in 1990 found that unequal programming still existed. The Court ruled that women were being discriminated against in the federal penal system on the basis of gender (contrary to sections 15 and 28 of the Charter) because federal penitentiaries for men have programs superior to those offered to women, and they exist across the country.

This decision echoed the findings of the report of the Task Force on Federally Sentenced Women. The report cited the need for training and programs to provide female inmates with truly marketable skills.

In addition, the report pointed out that despite improvements in programming at the Prison for Women following the Canadian Human Rights Commission ruling, the situation for women serving their sentence in a provincial institution (through an exchange of service agreement) had not improved.

The original exchange of service agreements accepted provincial standards for programs and services, thereby ignoring the needs of long-term offenders (offenders normally do not serve sentences longer than two years in a provincial institution). Despite the 1981 ruling, when these agreements were revised between 1984 and 1986, programming inequities were, once again, not addressed.

It was not until 1988 and the Burnaby Agreement (an agreement with a provincial facility for women in Burnaby, British Columbia) that the Correctional Service of Canada finally required provincial institutions to address the specific needs of federal offenders.

Despite this progress, the quality of programming is again being challenged in *Gayle Horii v. Her*

*Majesty the Queen.* In a pending Federal Court action, Ms. Horii alleges that she is being discriminated against as a woman because men receive all the advantages of the federal correctional system, while women receive inferior programming both at the Prison for Women and at the Burnaby Correctional Centre.

This issue too may be resolved with the construction of the new facilities for women. These facilities will be program driven and take a holistic approach. There will be individualized assessment and planning of programs based on each woman's needs. Programs will include spirituality, education, employment, skills training, recovery from abuse and trauma, and other personal development services.<sup>(5)</sup>

The federal government's commitment to providing more relevant programming for women was further enhanced with the proclamation of the *Corrections and Conditional Release Act* in 1992. Section 77 of the Act states that the Correctional Service of Canada shall "provide programs designed particularly to address the needs of female offenders." The strength of this commitment will no doubt be questioned in future litigation. Personal relationships The 19th-century female offender had few, if any, visitors and virtually no opportunity for physical contact with male offenders. Although great strides have been made to ensure that all inmates have visits with family and friends, geographic distances have made this difficult for women incarcerated at the Prison for Women.

To combat this problem, in 1989 the institution began entitling female offenders to one 15-minute telephone call per month to their families. In 1990, this was increased to two calls per month.

In 1992, the institution began entitling a woman whose spouse is also federally incarcerated to receive one 15-minute call per week from her spouse. A "private family visiting" program, which funds one visit per year, per inmate, was also put in place in 1992.

With the development of the new women's regional facilities, the Correctional Service of Canada may well be confronted with a new issue and court challenges regarding the frequency and costs of private family visits where both spouses are incarcerated at a great distance from each other.

Interestingly, during the 19th century, women were permitted to keep newborns with them until weaning. When alternative care was not available, some women were even incarcerated with their young children. Policy was eventually changed to prevent this. However, this did not make the problem go away.

*Creating Choices* highlighted the difficulties faced by women unable to have their children with them and, in many cases, geographically isolated from them.

In response, the Correctional Service of Canada has agreed that women with children should have a variety of on-site residential and visiting options when the new facilities are open. Where it is in the best interest of the child, a mother will even be able to care for her child in the institution until the child is of school age.

In the interim, the Prison for Women has dealt with nine pregnant inmates since 1990; Saskatchewan Penitentiary, with one. In most cases, the child was born during the mother's conditional release. A few

babies spent their first days in the institution, however, before being transferred with their mother to a provincial facility.

Recently, one mother was (with the consent of the Commissioner) allowed to care for her child at the minimum-security institution in Kingston. The efforts made to accommodate expectant mothers over the past few years seem to demonstrate the Service's acceptance of the task force recommendations. Staffing The presence of males in the Prison for Women is still a disputed issue. In fact, the Correctional Service of Canada has been cautious in recent years in the assignment of duties to males at the Prison for Women.

In 1989, however, an appeal was heard under the Public Service Employment Act because a competition for the position of correctional supervisor in the Prison for Women was limited to female employees.<sup>(6)</sup>

The Correctional Service of Canada argued that being female was a "bona fide" occupational requirement because the correctional supervisor would be expected to patrol living areas, possibly conduct a frisk or strip search, and have contact with inmates who had been physically or sexually abused by men.

But the appeal was granted because searching inmates and patrolling living areas were not stated requirements of the correctional supervisor's position. The court further found that the inmates had already adapted to a male unit manager, so the court could see no reason why the inmates would not accept a male correctional supervisor.

The tribunal also pointed to the decision of the Federal Court (Trial Division) in *Weatherall et al. V. Canada et al.* This decision struck down as unconstitutional subsection 41<sup>(3)</sup> of the *Penitentiary Service Regulations*, which allowed only women to search female inmates.

The 1993 decision of the Supreme Court of Canada in *Conway* (1993, not yet reported) adds a new perspective on this issue. Conway, a male inmate, argued that he was being discriminated against because he was subject to frisk searches and surveillance by female officers, whereas female inmates were not subject to the same treatment by male officers.

In rejecting Conway's position the Court found as follows:

Given the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors. Biologically, a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover, women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men. The different treatment to which the appellant objects thus may not be discrimination at all. Conclusion The position and opportunities for federally incarcerated women have greatly improved in recent years.

The establishment of five new regional facilities, with a holistic, women centred approach, should ensure that women's issues will remain at the forefront of corrections in Canada.

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(2) *Creating Choices: Report of the Task Force on Federally Sentenced Women* (Ottawa: Correctional Service of Canada, 1990).

(3) Complaint filed by Brigid Hayes on behalf of Women for Justice.

(4) *Federal Female Offenders - A Correctional Service of Canada Facts and Figures Handbook* Ottawa: Correctional Service of Canada, 1988): 78.

(5) Correctional Service of Canada's Federally Sentenced Women's Initiative.

(6) In the matter of M. King, Public Service Commission, 89-21-Pen-11.